Provisional

For participants only

24 September 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3443rd meeting
Held at the Palais des Nations, Geneva, on Friday, 3 August 2018, at 10 a.m.

Contents

Succession of States in respect of State responsibility (*continued*)

Interim report of the Drafting Committee

Draft report of the Commission on the work of its seventieth session (*continued*)

Chapter V. Identification of customary international law (*continued*)

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@un.org).

GE.18-12919 (E) 070818 240918

1812919

Please recycle

Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Succession of States in respect of State responsibility (agenda item 10) (*continued*)

Interim report of the Drafting Committee (ILC(LXX)/DC/SOSR/CRP.2)

Mr. Jalloh (Chair of the Drafting Committee), introducing the interim report of the Drafting Committee on the topic "Succession of States in respect of State responsibility", said that following the referral to it of draft articles 5 to 11, the Drafting Committee had held three meetings from 24 to 26 July 2018. He recalled that, at the Commission's sixty-ninth session, the Drafting Committee had provisionally adopted draft articles 1 and 2 and that draft articles 3 and 4 had been left in abeyance to be considered by the Committee at a later stage. He further recalled that, at the current session, when draft articles 3 and 4 would ordinarily have been considered, the Drafting Committee had not taken them up, at the request of the Special Rapporteur, who had explained in his second report (A/CN.4/719) that it would be more appropriate to return to those draft articles at an even later stage, and in any event after addressing the draft articles proposed in the second report. Accordingly, his statement constituted an interim report on the progress made thus far by the Drafting Committee.

Recalling that, during the Commission's debate in plenary, several members had proposed that a provision should be added to make clear the subsidiary nature of the draft articles, he said that the Drafting Committee had, at the Special Rapporteur's suggestion, adopted a new paragraph 2 under draft article 1 (Scope), which had been provisionally adopted at the Commission's sixty-ninth session. The new paragraph read: "The present draft articles apply in the absence of any different solution agreed upon by the States concerned." The words "any different solution" were intended to capture the vast array of possible solutions that the parties might adopt in a situation of succession of States. The words "agreed upon" were to be understood broadly, and did not refer only to the consent to be bound by a treaty. The term "States concerned" could refer to the predecessor State or States, the successor State or States, as well as any State injured by an internationally wrongful act that had occurred before the date of succession.

Turning to draft article 5, entitled "Cases of succession of States covered by the present draft articles", he said that the text of the provision, whose purpose was to limit the present draft articles to succession of States in conformity with international law, was modelled on article 6 of the 1978 Vienna Convention on Succession of States in respect of Treaties and article 3 of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts. A suggestion to delete the word "only" in the proposed draft article had generated significant discussion: in the view of the Drafting Committee, any deviation from the wording included in those two instruments could be misinterpreted as signalling an intention by the Commission to address the issue of legality of succession in a different manner in relation to the current topic than in relation to succession in respect of treaties or State property, archives and debts. A debate had then taken place on whether the rationale underlying the corresponding articles in the two Vienna Conventions on succession of States, respectively, also applied in the context of the current topic. Draft article 5 should not provide an advantage to unlawful successor States in relation to succession to responsibility. Ultimately, the Drafting Committee had provisionally adopted the draft article with no changes to the original formulation by the Special Rapporteur and it had been understood that the commentary would indicate that issues of State responsibility might indeed arise in complex situations where the legality of a succession was contested and that, in such situations, the general rules of international law on State responsibility would apply to unlawful successor States.

Turning to draft article 6, entitled "No effect upon attribution", he said that the draft article, which comprised just one paragraph, had been arrived at following an extensive debate within the Drafting Committee in relation to paragraph 1 of draft article 6 as proposed by the Special Rapporteur in his second report. The Drafting Committee had been of the view that, as originally drafted, draft article 6 (1) did not set forth a general rule applicable to the succession of States in respect of State responsibility, but rather addressed

the question of attribution, which several members of the Committee considered to be conceptually distinct from the general rule of non-succession. The Special Rapporteur had stated that it was preferable to set out a stand-alone provision concerning attribution before setting out the general rule of non-succession in a subsequent provision, and had made a proposal to that effect.

The purpose of draft article 6, then, was to indicate that rules of State responsibility did not cease to apply in situations of succession of States. It clarified that an internationally wrongful act that had occurred before the date of succession remained attributable to the State that had committed it. An extensive debate had taken place within the Drafting Committee on whether such a draft article was needed in the context of the current topic. According to a number of members, the draft article was unrelated to the current topic and unnecessarily reiterated a rule that was obvious. To the Special Rapporteur and a relatively small number of other members, on the other hand, retaining such a provision was important, because it constituted the logical premise of a number of subsequent proposed draft articles concerning aspects of State responsibility that were relevant in the context of State succession.

It had been stressed by several Drafting Committee members that the concept of attribution in draft article 6 might be conflated with the question of attribution of conduct addressed in article 2 (a) and chapter II of the articles on responsibility of States for internationally wrongful acts, which was only one of the two constitutive elements of an internationally wrongful act. In that regard, the Drafting Committee had opted for the formulation "attribution to a State of an internationally wrongful act committed by that State before the date of succession" precisely to emphasize that, in draft article 6, the term "attribution" must be understood in a broad sense, relating to the internationally wrongful act as a whole.

An alternative term for attribution, "imputation", had also been discussed, in view of the concern expressed by some members that the use of the term "attribution" might be confusing if it was not associated with the term "conduct" or if it was misread to mean something narrower than what had been intended by the Drafting Committee. For some members, rather than use the term "attribution", which had another meaning in the context of State responsibility, it might have been clearer to instead state that the obligations and rights arising from an internationally wrongful act committed before the date of the succession of States remained, in principle, with the predecessor State, which was the author of the wrongful act, since that was the crux of the matter.

After a thorough discussion, the Drafting Committee had provisionally adopted draft article 6 on the understanding that, taking into account the views expressed in the Drafting Committee, the draft article's wording and perhaps placement would be revisited before or during the completion of the first reading. That understanding was reflected in a footnote to the draft article. The Drafting Committee and the Special Rapporteur had also agreed that the latter would clearly explain the various concerns regarding the draft article in the commentary thereto.

He stressed that he had presented his interim report for information purposes only, as the Commission was not being requested to take action on the draft articles at the current stage. A complete text of the draft articles provisionally adopted thus far, along with the text of his interim report, would be posted on the Commission's website.

Noting that he was presenting his last report to the Commission as a whole in his capacity as Chair of the Drafting Committee, he said that the Drafting Committee had delivered some substantial outputs during the Commission's seventieth session, including the completion of the second reading of the outcome on two topics; the completion of the first reading of the outcome on two other topics; and completion of the consideration of new draft principles on the topic "Protection of the environment in relation to armed conflicts". It had also made progress on provisions concerning "Peremptory norms of general international law (*jus cogens*)" and "Succession of States in respect of State responsibility". He was pleased to further note that the Committee's texts concerning each of the topics had been provisionally adopted on the basis of consensus, despite the complex

issues involved and the strong views initially expressed by some members. He paid tribute to, *inter alia*, the Chair of the Commission for his capable leadership; the Drafting Committee members for their diligence and spirit of collegiality; the special rapporteurs, whose reports and contributions provided the foundation for the Commission's debates and subsequent work of the Drafting Committee; and the Secretariat for its crucial support.

The Chair said that he wished to express his thanks to the Chair of the Drafting Committee, whose performance had been exemplary not only in his mastery of very complex issues in a number of vastly different topics, but also in the even-handedness with which he had handled the members of the Drafting Committee, thus making it possible to find common ground and adopt by consensus all the texts referred to it by the Commission.

Mr. Rajput, referring to a proposal made by Mr. Nolte and supported by the Special Rapporteur on succession of States in respect of State responsibility, said that the Secretariat should be requested to conduct a study on that topic.

Mr. Tladi said that he would be interested in receiving more detailed information about the proposed study once a formal decision had been taken in regard thereto.

The Chair said that the parameters of such a study would be discussed by the Special Rapporteur with the Secretariat, which had already indicated its readiness to proceed with such a study if so requested. He took it, therefore, that the Commission wished to request the Secretariat to conduct a study on the succession of States in respect of State responsibility.

It was so decided.

Draft report of the Commission on the work of its seventieth session (*continued*)

Chapter V. Identification of customary international law (*continued*) (A/CN.4/L.918 and A/CN.4/L.918/Add.1)

The Chair invited the Commission to resume its consideration of the portion of chapter V of the draft report contained in document A/CN.4/L.918/Add.1.

Commentary to draft conclusion 11 (Treaties) (*continued*)

Paragraph (5)

Mr. Tladi said that, in the fifth sentence, the meaning of the phrase that followed the words "which carry greater weight" was unclear.

Sir Michael Wood (Special Rapporteur) said that the sentence meant that *opinio juris* carried more weight in cases where there were a large number of negotiating States than in cases where there were a small number of negotiating States. He suggested that deleting the phrase "in the identification of customary international law" might clarify the meaning.

Mr. Tladi said that he supported the deletion proposed by Sir Michael Wood.

Mr. Park proposed adding, in the fourth sentence, the phrase "(*travaux préparatoires*)" after the words "preparatory work", as the former was a familiar term to practitioners; moreover, there were other instances of French terms, such as "*doctrine*", in the commentary.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

Mr. Murphy proposed that the second sentence of the paragraph might be redrafted, for the sake of clarity, to read: "Caution is merited when regarding whether such a process has occurred."

Sir Michael Wood (Special Rapporteur) said that he was not opposed to the proposed amendment, but would prefer a word such as "considering" rather than "regarding".

Mr. Nolte said that the second sentence as originally drafted had the merit of referring to the process of the generation of a new rule of customary international law and not immediately to the identifier of such a rule; it drew the attention of the identifier to the fact that the process was rare and difficult and not one that could be presumed to occur. That was not conveyed by the sentence proposed by Mr. Murphy. He would therefore prefer to leave the second sentence as it was.

Mr. Saboia said he agreed with Mr. Nolte. It was not appropriate to emphasize caution since the text of the International Court of Justice being cited in the commentary highlighted that the generation of a new rule of customary international law was a careful process, but not one that necessarily required caution.

Sir Michael Wood (Special Rapporteur) said that, having heard the statements made by Mr. Nolte and Mr. Saboia, he was now convinced that the original drafting of the sentence was the best one.

The Chair said he took it that the Commission wished to adopt paragraph (7) without any amendments.

Paragraph (7) was adopted.

Paragraph (8)

Sir Michael Wood (Special Rapporteur) said that, in the penultimate sentence of the paragraph, it was not clear to what the word "it", in the phrase "or in order to derogate from it", referred. He therefore suggested replacing the word "it" with the phrase "an existing but different rule".

Paragraph (8), as amended, was adopted.

The commentary to draft conclusion 11, as a whole, as amended, was adopted.

Commentary to draft conclusion 12 (Resolutions of international organizations and intergovernmental conferences)

Paragraph (1)

Mr. Rajput proposed strengthening the second sentence by replacing, in the second sentence, the phrase "they may sometimes have value in providing evidence" with "they may provide evidence".

Mr. Tladi said that he supported the proposal by Mr. Rajput. He further proposed that, in order to better reflect draft conclusion 12 (2), the phrase "and may contribute to the development of a rule of customary international law" should be inserted at the end of the second sentence.

Sir Michael Wood (Special Rapporteur) said that he supported the proposal by Mr. Tladi. Regarding Mr. Rajput's proposed amendment, he wondered if it would be acceptable simply to delete the word "sometimes" and retain the phrase "may have value in providing".

Mr. Rajput said that he would prefer his original proposal.

Mr. Nolte said that the second sentence of the paragraph sought to describe two different situations; should Mr. Rajput's proposed amendment be endorsed, the line

between those two situations would become blurred and the sentence would lose its illustrative character. He would therefore prefer the Special Rapporteur's suggestion simply to delete the word "sometimes".

Mr. Rajput said that he failed to see how his proposed amendment would blur the meaning of the sentence or paragraph. It did make very clear that, although resolutions by themselves could not constitute rules of customary international law or conclusive evidence of customary international law, which was an accepted position, there could be situations where they might provide evidence of customary international law. The International Court of Justice itself had come to that conclusion twice. If that was so, it should be reflected clearly in the paragraph under consideration.

Mr. Saboia supported the statement and proposal made by Mr. Rajput.

Mr. Murphy said that it was important to ensure that the second sentence of paragraph (1) of the commentary to draft conclusion 12 captured paragraphs 2 and 3 of draft conclusion 12. The amendments proposed by Mr. Rajput and Mr. Tladi adequately reflected paragraph 2 but not paragraph 3, in the sense that the resolutions concerned "may reflect a rule of customary international law". He would therefore prefer to revert to the text as originally drafted.

Mr. Nolte said that the proposal by Mr. Rajput made the second sentence somewhat confusing, as the first part of it stated that resolutions adopted by international organizations or at intergovernmental conferences could not serve as conclusive evidence of rules of customary international law, and yet the second part of the sentence, as amended by Mr. Rajput, would go on to say that such resolutions "may" provide evidence.

Sir Michael Wood (Special Rapporteur) said that the sentence as originally drafted had been inspired by the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* case, in which it stated that "General Assembly resolutions, even if they are not binding, may sometimes have normative value". While he was not wedded to the use of the word "sometimes" in paragraph (1), he would prefer to retain the notion of "value".

Mr. Park said that he supported the position of the Special Rapporteur on the second sentence of paragraph (1), which had been carefully crafted on the basis of cases considered by the International Court of Justice.

The Chair said he took it that the Commission wished to adopt paragraph (1) as amended by Mr. Tladi and with the deletion, in the second sentence, of the word "sometimes".

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Park said that the words "may offer important evidence of the collective opinions of its members", which appeared in the second sentence, conveyed a similar meaning to the words "may reflect the collective expression of the views of such States", which were used in the first sentence of paragraph (3). While the wording in paragraph (3) seemed too weak, the wording in paragraph (2) was arguably too strong. He therefore proposed switching the language. In paragraph (2), that would entail replacing the words he had highlighted with "may reflect the collective views of its members". In paragraph (3), he would prefer to use the words "may offer important evidence of the collective expression of the views of such States".

Sir Michael Wood (Special Rapporteur) said that the change proposed by Mr. Park was a subtle one. The language in paragraph (2) was stronger, particularly bearing in mind the use of the word "important". In the first part of the session, there had been a great desire within the Commission to emphasize the significance of General Assembly resolutions in the present context. His preference was to retain the wording as it stood.

Mr. Nolte asked whether it would be more logical to speak of the "collective opinion" of members, in the singular.

Sir Michael Wood (Special Rapporteur) said that, although both the singular and the plural were acceptable, he was willing to replace the word "opinions" with "opinion".

Paragraph (2), as amended, was adopted subject to a minor editorial change.

Paragraph (3)

Mr. Tladi proposed that, in the second sentence, the phrase "for the most part do not seek to embody legal rights and obligations" should be deleted. As far as he was aware, the Commission had not carried out any empirical study to determine the veracity of that claim, and, in any event, it was sufficient to say that resolutions were not normally legally binding.

The Chair said that one example that sprang to mind immediately was General Assembly resolution 2131 (XX) of 1965, on the definition of the principle of non-intervention. He took it that the Commission wished to adopt paragraph (3) as amended by Mr. Tladi.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (7)

Paragraphs (4) to (7) were adopted.

Paragraph (8)

Mr. Tladi said that, in the last sentence, the word "actual" was superfluous and should be deleted.

Paragraph (8), as amended, was adopted.

The commentary to draft conclusion 12 as a whole, as amended, was adopted.

Commentary to draft conclusion 13 (Decisions of courts and tribunals)

Paragraph (1)

Mr. Murphy said that, in the third sentence, he would prefer to replace the conjunction "and/or" with "or". In the fourth sentence, for the sake of consistency with paragraph (1) of the commentary to draft conclusion 14, the words "*moyen auxiliaire*" should be added, in parentheses, after "subsidiary means".

Mr. Nolte said that, while he shared Mr. Murphy's distaste for the conjunction "and/or", it made eminent sense to use it in the third sentence, as decisions of national courts often served as both practice and evidence of acceptance as law.

Mr. Murphy proposed that the words "as well as" should be used instead of "and/or", since they had the same implications.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Sir Michael Wood (Special Rapporteur) said that, in the first sentence, the words "(in French, *moyen auxiliaire*)" could now be deleted.

Mr. Hmoud said that the meaning of the last sentence was unclear.

Sir Michael Wood (Special Rapporteur) suggested that the sentence would perhaps be clearer if the words "in practice" were replaced with "for the identification of customary international law".

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Tladi said that the claim, in the third sentence, that other considerations might include "the composition of the court or tribunal (and the particular expertise of its members)" was problematic and best avoided. There was no practice to support such a claim, nor was any authority cited to substantiate it.

Mr. Nolte said that, in the second sentence, the word "future" should be replaced with "subsequent". To respond to Mr. Tladi's comment, the word "composition" was ambiguous, in that it might refer to the difference between a single judge and a bench, with the latter being associated with higher courts, whose reasoning typically benefited from a greater degree of collective wisdom. The reference to "expertise", on the other hand, was very important and should be retained.

Mr. Tladi said that he would much rather avoid subjective elements, especially as members had stressed that, in its consideration of the topic, the Commission should be guided by practice. The fact that a tribunal was composed of eminent judges did not clarify how it came to a conclusion that something was customary international law, nor did it mean that the tribunal's decisions should automatically be given more weight than those of a tribunal that, while comprising lesser judges, was rigorous in its work.

Mr. Murphy said that the Commission made subjective judgments elsewhere, for example in draft conclusion 14, in which it referred to "teachings of the most highly qualified publicists". Paragraph (3) was in a part of the commentaries in which the Commission was still talking about both national and international courts and tribunals. The distinction that was being drawn through the mention of "expertise" was between courts and tribunals that had no expertise in international law and those that did. While he would be happy to accept the majority view, the third sentence could, in his view, be adopted as it stood.

The Chair said that he sympathized with Mr. Tladi's position. Members of the International Tribunal for the Law of the Sea, for example, were, in principle, elected because of their recognized competence in the field of the law of the sea. The same was not necessarily true of the International Court of Justice, which nevertheless dealt with matters relating to the law of the sea. Indeed, it was the Court's pronouncements that tended to be given greater weight, as they were frequently relied upon by States. The third sentence, as currently worded, seemed to indicate that a decision of the Court on a matter relating to the law of the sea had less value than a decision of the Tribunal, on the basis that the Court's members were not necessarily experts on the law of the sea, whereas the Tribunal's members supposedly were. In reality, however, many members of the Court were, and some members of the Tribunal were not. In his opinion, the Commission should stick to the principle generally applied in tribunals, which was that judges should be knowledgeable about the law.

Mr. Tladi said that there was some authority for the subjective judgment expressed by the Commission in draft conclusion 14, namely the Statute of the International Court of Justice, but there was no such authority for the claim made in the third sentence of paragraph (3). The differences between various types of courts and tribunals were covered in paragraph (4), which could be expanded, if necessary.

Mr. Rajput said that, although he sympathized with Mr. Tladi's concerns, the statement in the third sentence of paragraph (3) was qualified by the word "might" and the phrase "depending on the circumstances". The sentence was carefully crafted and allowed the Commission to take stock of evolving jurisprudence without having to cite empirical studies that risked confusing matters.

Mr. Vázquez-Bermúdez said that he agreed with Mr. Tladi. It was the quality of a court's reasoning and the rigour with which it carried out its work that mattered. The Commission should not encourage scrutiny of judges' qualifications as a means of determining whether their decisions had any merit.

Ms. Escobar Hernández said that she also supported the comments made by Mr. Hladi. By incorporating elements that were clearly subjective, the Commission would be sending the wrong message. Since paragraph (3) dealt with both national and international courts and tribunals, there was the potential for confusion. Moreover, although the Commission did make a subjective judgment in draft conclusion 14, it must be taken into account that publicists acted in their individual capacity, whereas courts and tribunals issued decisions in their institutional capacity, so the personal qualifications of the judges thereof should not be a consideration. She did not object to the reference to the size of the majority by which a decision was adopted. It was not clear, however, what was meant by the phrase "the conditions under which the court or tribunal conducts its work".

Sir Michael Wood (Special Rapporteur) said that he would be happy to delete the phrase "the composition of the court or tribunal (and the particular expertise of its members)".

Mr. Saboia, supported by **Mr. Ruda Santolaria** and **Mr. Gómez-Robledo**, said that, while he would welcome such a deletion, he agreed with Ms. Escobar Hernández that the meaning of the phrase "the conditions under which the court or tribunal conducts its work" was unclear.

Mr. Park said that, during the previous quinquennium, the Commission's Study Group on the most-favoured-nation clause had discussed and analysed a number of international arbitration cases and had found many of the judgments delivered therein to be contradictory. Consequently, most of the members of the Study Group had conceded that the composition of an arbitration tribunal was important in evaluating the value and reliability of its judgments. While the composition of a court or tribunal and the particular expertise of its members were indeed subjective elements, they could not be ignored entirely.

The Chair said that there was a clear distinction to be drawn between the awards of arbitration tribunals and the jurisprudence of a permanent institution like the International Court of Justice. The Commission should not seek to transpose its reasoning about the former to the latter.

Mr. Gómez-Robledo said he hoped that the issue of the value to be accorded to a decision would not be raised again in the context of paragraph (5), which dealt with separate and dissenting opinions, as he would not be in a position to support any changes to that paragraph.

Mr. Jalloh said that it was not clear to him whether the original proposal had been only to delete the part of the third sentence in parentheses — "and the particular expertise of its members". In view of the complex array of regional and subregional courts and tribunals in the African region, for example, the "composition of the court or tribunal" might be a relevant consideration, although he was not opposed to deleting that reference. At the end of the second sentence, he wondered whether the addition of a reference to reception of a decision by "relevant international organizations", such as the International Committee of the Red Cross, might also be considered. The choice of the word "conditions" at the end of the third sentence in relation to the conduct of the court or tribunal seemed very obscure.

Ms. Lehto, referring to the end of the third sentence, said that, if paragraph (3) was intended to refer to both international and national courts and tribunals, the phrase "conditions under which the court or tribunal conducts its work" might serve a purpose, for example in situations in which national courts and tribunals were not truly independent. She would therefore see some merit in retaining it.

Mr. Hmoud said that he had no particular objection to the reference to the composition and expertise of the court or tribunal. He had been a member of the Study Group on the most-favoured-nation clause and recalled that the composition of arbitration tribunals had been a major issue in the discussions, and the relevance of the expertise of a tribunal in the assessment of international law related to investment had also been raised. To his mind there was value in considering the composition of a court or tribunal, but if the

majority of members were in favour of deleting that part of the sentence, he would not oppose that decision, particularly since reference was already made in the second sentence to the importance of the quality of the reasoning in determining the value of decisions. Regarding the phrase "the conditions under which the court or tribunal conducts its work", he wondered whether an alternative might be to refer to the "rules of procedure" or "rules and procedures" under which it conducted its work, which would take into account whether it was part of its mandate to assess customary international law.

Mr. Hassouna said that the composition and expertise of courts and tribunals was, of course, a controversial issue. The starting premise should be that tribunals were different, whether they were national, regional or international or dealt with investment or criminal law or some other subject. Recalling that it had been agreed in the plenary that an effort should be made not to introduce any subjective elements in the commentary, he said he agreed with Mr. Tladi's proposal and welcomed the Special Rapporteur's willingness to delete the reference to expertise. He also agreed that the term "conditions" in relation to the conduct of the court or tribunal's work was rather vague.

Mr. Argüello Gómez said that the question of the decisions of courts was a very sensitive one that should be approached with caution, and the Commission should not give the impression that there were different categories of rulings that could be ranked in terms of importance depending, for example, on the size of the majority by which they had been adopted. He understood that lawyers would use such arguments when alleging the existence of a rule of customary international law, but it was not the Commission's place to do so. He agreed with Mr. Tladi's point about subjective elements.

Mr. Murphy said that, in the part of the commentary under consideration, the Commission was referring not only to the permanent international courts, but to all courts and tribunals. Of course, the Commission would give considerable weight to the decisions of prominent international courts such as the International Court of Justice and the International Tribunal for the Law of the Sea; the question was whether it should also take into account the decisions of national and local courts. The issue raised by Mr. Park concerning the composition and quality of the judgments of arbitration tribunals should also be taken into consideration. Given the objections to the references to the composition and expertise of the members of a court or tribunal, perhaps the formulation "nature of the court or tribunal" might be an acceptable alternative. Although there was a reference in paragraph (7) to exercising caution when seeking to rely on decisions of national courts, in his view it would be unfortunate not to acknowledge in some way in paragraph (3) that those elements mattered, because it was a reality that the Commission did not view the International Court of Justice on a par with lower national courts, for example.

Mr. Tladi said that, while he agreed with the points raised by Mr. Murphy, the sentence under discussion was not just about the nature of the court. His concern was that it referred more specifically to who was on the bench and their expertise, and one of the reasons he felt so strongly about the issue was that it tended to be raised in relation to African courts.

Mr. Petrič said that, while the issue had been resolved by the Special Rapporteur agreeing to delete that part of the sentence, he agreed that the Commission should avoid discussing who was on the bench of a particular court or tribunal. However, given that it was not only the decisions of the International Court of Justice that were in question, but also those of national courts, he would insist on retaining the reference to the circumstances in which the court or tribunal functioned. He had been shocked by some of the decisions taken by high-level courts in Europe in recent years, for example, which appeared to have been politically motivated. Therefore, the circumstances in which a decision had been taken by a court or tribunal, for instance after a coup d'état or under a dictatorship, were highly relevant in determining the importance to be attached to the decision in determining the existence of a rule of customary international law.

Mr. Nolte said that, as there appeared to be significant common ground among the members, perhaps the Special Rapporteur would be able to propose an acceptable alternative text in the light of the discussion on the matter.

Sir Michael Wood (Special Rapporteur) said that, on the basis of the helpful suggestions made by members, he would propose that the third sentence should be reformulated to read: "Other considerations might, depending on the circumstances, include the nature of the court or tribunal; the size of the majority by which the decision was adopted; and the rules and procedures applied by the court or tribunal." The reference to "rules and procedures" would cover concerns about how a court operated.

Mr. Grossman Guiloff said that the fact that paragraph (3) addressed decisions concerning the existence and content of rules of customary international law would automatically exclude many courts. Sufficient safeguards had already been incorporated into the commentary; the references to the "quality of the reasoning" and the "reception of the decision" in determining the value of such decisions covered many of the concerns raised. In the second sentence, the Special Rapporteur might consider the formulation "the value of such decisions varies greatly, however, depending on factors such as …", so as not to limit the factors that might be taken into consideration. He agreed that the majority by which the decision had been adopted was an important consideration. He supported the deletion of the reference to the composition and expertise of the court or tribunal, which in addition to being subjective was possibly offensive.

Mr. Ouazzani Chahdi said that he supported the compromise solution proposed by the Special Rapporteur, particularly the reference to "rules and procedures", but would welcome clarification of what was meant by the "nature" of the court or tribunal.

Sir Michael Wood (Special Rapporteur) said that the "nature of the court or tribunal" would cover a whole range of characteristics, including whether it was a national, regional or international court or a higher, lower or appeal court, for example. It would simply indicate to the person seeking to identify a rule of customary international law that it was important to look carefully at the court that had handed down the decision.

Mr. Nolte said that he agreed with the Special Rapporteur's proposal but would tweak it slightly to say "the rules and the procedures" rather than "the rules and procedures", as the latter sounded like it referred to a single set of rules and procedures, whereas the former clearly referred to how the procedure had actually been conducted.

The Chair said he took it that the Commission wished to adopt the amendment proposed by the Special Rapporteur with the further modification by Mr. Nolte.

It was so decided.

Paragraph (3), as amended, was adopted.

Paragraphs (4)

Mr. Jalloh asked whether the reference to "regional human rights courts" included regional human rights commissions that issued authoritative decisions on issues of customary international law.

Mr. Grossman Guiloff said that he would welcome clarification of what the Special Rapporteur understood by "other arbitral tribunals applying international law".

Sir Michael Wood (Special Rapporteur) said that if the regional human rights commissions were, in fact, courts, they were included. The reference to "other arbitral tribunals applying international law" was intended to cover investment tribunals that were not inter-State but that had been set up under treaties, in which one party was a State and the other a private company.

Paragraph (4) was adopted.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

Paragraph (7)

Mr. Rajput said that the statement in the last sentence about national courts should perhaps be toned down by adding the word "may" before "sometimes lack international law expertise".

Mr. Tladi proposed adding a footnote after the first sentence with a reference to the judgment of the South African Supreme Court of Appeal in *Minister of Justice and Constitutional Development and Others v. South African Litigation Centre and Others*, in which the Court had made a similar point in a slightly different way.

Sir Michael Wood (Special Rapporteur) said that he had no objection to including a reference to a particular paragraph of the judgment. He also accepted Mr. Rajput's proposal.

Paragraph (7), as amended, was adopted.

The commentary to draft conclusion 13 as a whole, as amended, was adopted.

Commentary to draft conclusion 14 (Teachings)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

Mr. Rajput said that he would be interested to know why the Special Rapporteur had used the word "products" rather than "output" in the first sentence to describe the work of international bodies engaged in the codification and development of international law.

Sir Michael Wood (Special Rapporteur) said that, as the term "output" was traditionally used to describe the work of the Commission, he had considered a more general word like "product" to be more appropriate when referring to the work of a range of bodies.

Mr. Nolte said that, the word "output" was actually used in the third sentence to refer to the same "products", so the text should be streamlined and the word "output" used in the first sentence also.

The Chair said he took it that the Commission wished to accept Mr. Nolte's proposal.

It was so decided.

Mr. Grossman Guiloff said that he would be interested to know whether the Special Rapporteur had given any consideration to including a reference to the output of some of the regional bodies representing the principal legal systems and regions of the world, such as the Inter-American Juridical Committee, with which the Commission engaged.

Mr. Nolte said that perhaps adding the words "and from different regions" at the end of the second sentence after "in particular fields" would cover that point.

Sir Michael Wood (Special Rapporteur) said that, as the regional bodies mentioned by Mr. Grossman Guiloff were intergovernmental bodies, it would be inappropriate to refer to them in the section on teachings. However, he had no objection to Mr. Nolte's proposal. He recalled that there had been considerable debate as to whether reference should be made to the work of the Commission itself in the present commentary, but it had been concluded that its output constituted more than simply "teachings" and should thus be dealt with elsewhere.

Mr. Grossman Guiloff said that, in his view, it would be appropriate to refer to the work of the regional bodies in that paragraph because, although they had been created under treaties, their members served in an individual capacity.

The Chair said that those regional bodies with which the Commission maintained formal links of cooperation were the organs of intergovernmental organizations; the Inter-American Juridical Committee, for example, was an organ of the Organization of American States. The Institute of International Law and the International Law Association, meanwhile, were private institutions, and did not fall into the same category.

Mr. Jalloh said that he supported Mr. Nolte's proposal, which in his view adequately addressed Mr. Grossman Guiloff's concerns.

The Chair said he took it that the Commission wished to accept Mr. Nolte's proposal.

It was so decided.

Paragraph (5), as amended, was adopted.

The commentary to draft conclusion 14 as a whole, as amended, was adopted.

Part Six (Persistent objector)

The chapeau of Part Six was adopted.

Commentary to draft conclusion 15 (Persistent objector)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Nguyen proposed replacing the word "formation" with "emergence".

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Murphy proposed replacing the words "and/or" in the first sentence simply with "or".

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Tladi said that the sources in footnote 115 to paragraph (4) should be reordered on the basis of two criteria: first, the nature of the forum that handled the cases mentioned; and, second, whether or not the persistent objector rule had been recognized in a particular case.

Sir Michael Wood (Special Rapporteur) said that, in footnote 115, international tribunals had been listed first, followed by national tribunals. In his opinion, that approach worked well; sources in other footnotes had not been arranged according to their degree of relevance.

Mr. Jalloh said that the question raised by Mr. Tladi, and Sir Michael Wood's answer, were related to the question he had asked earlier. Since footnote 115 contained a reference to the Inter-American Commission on Human Rights, he took it that the term "human rights courts" in paragraph (4) of the commentary to draft conclusion 13 was intended to include human rights commissions such as the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights. The distinction drawn in that earlier paragraph had not been made clear in the paragraph under consideration; although he was simply stating his position, he felt it was important to clarify the point.

Mr. Argüello Gómez said he wished to point out that the *Fisheries* case, which was mentioned in footnote 115, had not established the principle of the persistent objector rule.

The term appeared in the judgment of the case strictly *obiter dictum* and had not been taken up by the dissenting judges.

Sir Michael Wood (Special Rapporteur) said that the *Fisheries* case was often referred to in connection with the persistent objector rule, including in documents of the Commission.

Ms. Oral, supported by **Mr. Jalloh**, said that the first sentence could be made clearer either by deleting the words "not infrequently invoked" or by inserting the word "is" before "recognized" and removing the comma after "recognized".

Mr. Šturma, supported by **Mr. Saboia**, proposed replacing the words "not infrequently" with "sometimes" to avoid placing too much importance on the role of the persistent objector rule.

Mr. Murphy said that the word "invoked" ought to be retained, since in footnote 116 attention was being drawn to situations in which a State invoked the rule but its validity might not be recognized by other States, depending on the circumstances. It would be preferable to leave the sentence in its original form.

Mr. Park agreed with Mr. Murphy that the sentence should remain as it was.

Sir Michael Wood (Special Rapporteur) said that he preferred to leave the sentence unchanged since it was close to the language that had been used on first reading, to which States had not objected, and it captured better the intended meaning.

Paragraph (4) was adopted.

Paragraphs (5) to (10)

Paragraphs (5) to (10) were adopted.

The commentary to draft conclusion 15 as a whole, as amended, was adopted.

Part Seven (Particular customary international law)

The chapeau of Part Seven was adopted.

Commentary to draft conclusion 16 (Particular customary international law)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

Mr. Murphy proposed deleting the word "always" in the first sentence of paragraph (5) and replacing the word "should" with "could" in the second sentence.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted with minor editorial corrections.

Paragraph (7)

Paragraph (7) was adopted.

The commentary to draft conclusion 16 as a whole, as amended, was adopted.

The Chair invited the Commission to turn its attention to section C of chapter V, contained in document A/CN.4/L.918, recalling that paragraph 11 in that section had been left in abeyance.

C. Recommendation of the Commission

Paragraph 11

Sir Michael Wood (Special Rapporteur) said that his original proposal for paragraph 11, the text of which had been circulated in the meeting room, had been identical to the Commission's recommendation to the General Assembly in paragraph 129 of his fifth report (A/CN.4/717). He had received two proposals for additions to that text. Mr. Murase had proposed a reference to the bibliography, so a new subparagraph had been inserted, paragraph 11 (c), that would read "take note of the bibliography prepared by the Special Rapporteur". Mr. Jalloh had proposed that in paragraph 11 (e) (ii), the words "including by their timely publication" should be added before the semicolon. The Secretariat had been consulted on the content of paragraph 11 and was satisfied with it.

Mr. Tladi said that he had concerns about the inclusion of a recommendation that the General Assembly should take note of a bibliography. In his experience, the General Assembly was often reluctant to do so.

Mr. Rajput said that he shared Mr. Tladi's concerns.

Mr. Murase said that it was important for the General Assembly to take note of the bibliography since it was contained in a separate document to the commentaries.

Mr. Nolte said that although he was reluctant to refer the General Assembly to material that had not been produced by the Commission, the bibliography served an important function in highlighting the representativeness of the Commission's work on the draft conclusions and its roots in the wider community. He therefore supported the inclusion of the recommendation regarding the bibliography.

Sir Michael Wood (Special Rapporteur), supported by **the Chair**, said that, while he would not insist on the inclusion of the reference to the bibliography, an alternative could be to replace the words "take note of" with "note". When the resolution was drafted in New York, a decision could then be taken as to whether to include a reference to the bibliography, for example, in the preamble, or to omit it.

Mr. Park said that the inclusion of the reference to the bibliography would set an important precedent, since the Commission's work on other topics, including the provisional application of treaties and protection of the environment in relation to armed conflicts, had also included bibliographies. Another option could be to include the reference in subparagraph (a) rather than having it as a separate subparagraph.

Mr. Jalloh said that he wished to place on record his reservations about the process of formulating the recommendation. As he had said in his statement on the topic of identification of customary international law in the first part of the current session, the substantial work contained in the 172-page memorandum by the Secretariat on "Ways and means for making the evidence of customary international law more readily available" (A/CN.4/710) deserved further discussion by the Commission. Had time allowed for such a discussion, the Commission might have produced a stronger set of recommendations. It was regrettable that, given that the Commission's previous study of the issue had been prepared as long ago as 1950, such an important recommendation to the General Assembly had not benefited from thorough deliberation, particularly in view of the imbalance in the availability of evidence of customary international law in developing countries, especially in the African region.

Mr. Huang said he was concerned that, having spent a great deal of time on the consideration of other paragraphs in chapter V, the Commission was now in too much of a hurry to adopt the most important paragraph, the one containing the recommendation to the General Assembly. Moreover, he was not sure whether such an important paragraph should be considered in English only, without translations into the other official languages.

He did not support the inclusion of the reference to the revised bibliography, since it was limited and selective and contained few works in languages other than English and French.

Lastly, it was unclear what "and other entities", at the end of paragraph 11 (e) (iii), referred to. It would not be appropriate to request the Secretariat to make efforts to correct information and sources from entities that had no relationship to the Commission or its work.

Mr. Llewellyn (Secretary to the Commission) said that the Special Rapporteur's proposal for paragraph 11, which had been put forward in the original language of the report could perhaps be read aloud in plenary for interpretation into the other official languages.

The Chair said that it would be preferable to avoid any procedural shortcomings in the adoption of the report, as they might be used to question the Commission's recommendations to the General Assembly regarding the draft conclusions.

Sir Michael Wood (Special Rapporteur) said that, with the exception of the two additions by Mr. Murase and Mr. Jalloh, his proposal was identical to paragraph 129 of his report, which had already been translated into the other official languages. With regard to the bibliography, he had repeatedly asked the members to contribute items in their own languages. It was unfortunate that time constraints had not allowed for more detailed discussion of the memorandum by the Secretariat; however, it could be discussed further at a future meeting.

The meeting rose at 1.10 p.m.